71-913

Supreme Court of the United States

OCTOBER TERM 1971

Supreme Court, U.S.
FILED
JAN 12 1972
E. ROBERT SEAVER, CLERK

No. .....

In the Matter of the Complaint of

SEABOARD SHIPPING CORPORATION, as owner of the Barge Oil Transfer 32,

Petitioner,

for exoneration from or limitation of liability.

MORAN INLAND WATERWAYS CORPORATION and MORAN TOWING AND TRANSPORTATION CO., INC., Claimants,

Respondents.

In the Matter of the Complaint of

MORAN INLAND WATERWAYS CORPORATION, as owner, and MORAN TOWING & TRANSPORTATION CO., INC., as chartered owner of Tug Margot Moran,

Respondents,

for exoneration from or limitation of liability.

SEABOARD SHIPPING CORPORATION, Claimant,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON BEHALF OF SEABOARD SHIPPING CORPORATION

EDMUND F. LAMB,
Attorney for Petitioner,
350 Broadway,
New York, N. Y.

TABLE OF CONTENTS

	PAGE
Jurisdiction	2
Question Presented for Review	2
Statement of the Case	3
Reasons for Granting The Writ	5
Conclusion	8
Appendix A	9
Appendix B	25

Cases Cited

Benazet v. Atlantic Coast Line Railroad Co., 442 F.2d 694 (1971), certiorari granted No. 71-107 (Oct. 26, 1971), sub nom. Atlantic Coast Line R.R. Co. v. Erie Lackawanna R.R. Co.	5, 8
Crumady v. J. H. Fisser, 358 U.S. 423 (1959)	6, 7
Dunbar v. Henry Dubois' Sons Co., 275 F.2d 304 (1960)	6
Halcyon Lines v. Haenn Ship C & R Corp., 342 U.S. 282 (1951)	5, 6, 7
Hartford v. Gulf Refining Co., 230 F.2d 346 (1956), cert. den. 352 U.S. 832	6
Horton & Horton, Inc. v. T/S J. E. Dyer, 428 F.2d 1131 (1970), cert. denied, 400 U.S. 993 (1971)	6

PAGE

Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315 (1964) 5, 6, 7, 8

McLaughlin v. Trelleborg's Angfartygs A/B 408 F.2d 1334, cert. den. 395 U.S. 946 (1969) 5, 8

Ryan v. Pan Atlantic S.S. Co., 350 U.S. 124 (1955) .. 6, 7

Tebbs v. Baker-Whitely Towing Company, 407 F.2d 1055 (1969) 7

Watz v. Zapata Off-Shore Co., 431 F.2d 100 (1970) .. 6

Weyerhauser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563 (1958) 6, 7

Supreme Court of the United States

OCTOBER TERM 1971

No. .....

In the Matter of the Complaint of

SEABOARD SHIPPING CORPORATION, as owner of the Barge Oil Transfer 32,

Petitioner,

for exoneration from or limitation of liability.

MORAN INLAND WATERWAYS CORPORATION and MORAN TOWING AND TRANSPORTATION CO., INC., Claimants,

Respondents.

In the Matter of the Complaint of

MORAN INLAND WATERWAYS CORPORATION, as owner, and MORAN TOWING & TRANSPORTATION CO., INC., as chartered owner of Tug Margot Moran,

Respondents,

for exoneration from or limitation of liability.

SEABOARD SHIPPING CORPORATION, Claimant,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON BEHALF OF SEABOARD SHIPPING CORPORATION

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Seaboard Shipping Corporation, prays that a writ of certiorari be issued to review the decision and

judgment of the United States Court of Appeals for the Second Circuit and the denial of a petition for a rehearing or a re-hearing *in banc*, reversing a judgment entered in the United States District Court for the Southern District of New York on November 5, 1970 dismissing the complaints in both above-entitled consolidated actions and remanding the actions to the District Court for an equal division of damages paid in settlement of claims for the deaths of the two crew-members of the Barge Oil Transfer 32.

The opinion of the Court of Appeals is reported at 449 F2d. 132. A copy is appended hereto (*infra*, p. 10). The opinion of the District Court is reported at 320 F.Supp. 229 and a copy is appended hereto (*infra*, p. 25).

Jurisdiction

The judgment of the Court of Appeals reversing the judgment of the District Court is dated September 29, 1971 and was entered on September 29, 1971.

Orders of the Court of Appeals denying a petition for rehearing containing a suggestion that a rehearing *in banc* be granted pursuant to Rule 35 F.R.A.P. were made and entered on November 8, 1971.

Jurisdiction to review the judgment of the Court of Appeals by a writ of certiorari is invoked under 28 U.S.C. Sec. 1254(1) and Sec. 2101(c) and Rule 19.1(b) of this Court.

Question Presented for Review

Where the deaths of the two crew members of a barge in tow of a tug are found to have been caused by the joint fault of both the barge owner because of unseaworthy conditions of the barge and of the tug owner and operator because of the negligent failure of the tug to properly per-

form its towage engagement, should there be an equal division between tug and barge of damages paid in settlement of the death claims or should the barge owner have indemnification from the owner and operator of the tug for the amounts paid by it toward the settlement of the death claims?

Statement of the Case

The basis of Federal jurisdiction in the Court of first instance is the Admiralty and Maritime Jurisdiction of the United States District Court.

During the course of the towage by the tug Margot Moran of the Barge Oil Transfer 32 loaded with a cargo of benzoil on the open waters of Lake Michigan during a severe storm in early November, 1966, the two crew members of the barge were lost overboard.

The barge had loaded her cargo at Lemont, Illinois, bound for Bay City, Michigan, on October 30, 1966, to her Intermediate Marks; giving a freeboard of 3 feet 5 inches. The barge was pushboated by the Margot Moran to Chicago, arriving there on the afternoon of October 30th. The tow lay over at Chicago because of gale warnings until 8:30 A.M. on November 1 when the tug departed Chicago although gale warnings were still displayed.

At 2400 hours, October 31, the season for Intermediate Marks expired. The winter permissible drafts were 2¾ inches less than permitted by the Intermediate Marks. A vocaline radio with which the barge was equipped had been out of order for several months to the knowledge of the tug, so that there was no effective means of communication between the tug and the barge which, after clearing Chicago, was let out on a 1200 foot long hawser. In September, 1966 the barge's lifeboat had sustained a damage which it was thought by the barge captain might have rendered it unseaworthy. As a substitute, to the

knowledge of the tug, an inflatable liferaft canister had been placed aboard the barge in the lifeboat.

Because of the weather conditions, after leaving Chicago the tug proceeded up the west shore of Lake Michigan instead of proceeding on a course across the lake to the easterly shore (her usual course to Bay City). By midnight when the tow was off Milwaukee it was enveloped in a heavy snowstorm, and as it proceeded northerly the weather worsened with the seas building in height.

At 9:00 A.M. on November 2nd the tug made a radical change of course heading east northeast across the lake toward Big Sable Point on the east shore 50 miles away, although then only 11 miles off Sheboygan, an available harbor of refuge. While on this heading, at 1:30 P.M. on November 2nd the tug received a Special Lakes Warning renewing gale warnings for the area of the lake which the tug was then traversing. Although the tug could still have turned back and made safe haven at Sheboygan, as found by both the District Court and the Court of Appeals, it persisted on its course toward Big Sable Point and eventually got caught in one of the worst storms on Lake Michigan in many years. While the tug was attempting to ride out this storm the two crew members of the barge were lost overboard.

The Court of Appeals found the barge unseaworthy and its owner negligent in that:

1. Its radio was out of order;

2. The liferaft was impropery stowed;

3. The barge had been loaded to her Intermediate Marks instead of her Winter Marks.

After reviewing in detail the navigation of the tug in the light of the weather conditions, the weather forecasts, and the tug's knowledge as to the condition of its tow, the Court found the tug negligent is not making a safe

haven at Sheboygan and concluded:

> "But without the negligence of the tug in heading easterly with a mute and helpless tow into the approaching whole gale, this tragedy would not have occurred."

Reasons for Granting The Writ

The decision below is in direct conflict with decisions of this Court in an important area of Maritime Law, consistently followed by the Circuit Courts of Appeal up until the present with the exception of two recent decisions in the Fifth Circuit.

The Court of Appeals in the instant case refused to apply the doctrine enunciated by this Court in 1951 in *Halcyon Lines* v. *Haenn Ship C & R Corp.*, 342 U.S. 282. In that case this Court expressly held that it would not allow contribution for Maritime personal injury damages other than in collision cases. The *Halcyon* doctrine was reiterated by this Court as recently as 1964 in *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U.S. 315. The Court of Appeals has consistently followed the *Halcyon* doctrine up to the present. See, *McLaughlin* v. *Trelleborg's Angfartygs A/B*, 408 F.2d 1334, cert. den. 395 U.S. 946 (1969) and *Benazet* v. *Atlantic Coast Line Railroad Co.*, 442 F.2d 694 (1971), certiorari granted No. 71-107 (Oct. 26, 1971), sub nom. *Atlantic Coast Line R.R. Co.* v. *Erie Lackawana R.R. Co.*

Certiorari was granted in *Atlantic Coast Line* on the specific issue of whether or not contribution may be had between joint tort-feasors for personal injuries in a maritime non-collision case. Unless Certiorari is granted in the present case petitioner will be deprived of the benefit of the ruling of this Court on this essential issue in its case. Moreover, unlike the petition in *Atlantic Coast Line*, this petition raises the further issue of indemnity for per-

sonal injury damages in a maritime non-collision case, which is necessarily intertwined with the question of contribution in such cases.

In the present case, contrary to its own prior holdings and following the U. S. Court of Appeals for the Fifth Circuit in *Horton & Horton, Inc. v. T/S J.E. Dyer*, 428 F.2d 1131 (1970), cert. denied, 400 U.S. 993 (1971) and *Watz & Zapata Off-Shore Co.*, 431 F.2d 100 (1970),* the Court below arbitrarily restricted the application of the *Halcyon* doctrine to cases where the joint tort-feasor against whom contribution is sought is immune from tort liability by statute.

In so doing the Court of Appeals not only repudiated the *Halcyon* decision but also completely disregarded the maritime doctrine of indemnity originally enunciated by this Court in *Ryan* v. *Pan Atlantic S.S. Co.*, 350 U.S. 124 (1955) and further elaborated in *Weyerhauser S.S. Co.* v. *Nacirema Operating Co.*, 355 U.S. 563 (1958), *Crumady* v. *J.H. Fisser*, 358 U.S. 423 (1959) and most recently in *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U.S. 315 (1964), and previously applied by the Second Circuit Court of Appeals in a case closely analogous to the present case involving the towage relationship in *Dunbar* v. *Henry Dubois' Sons Co.*, 275 F.2d 304 (1960).

In *Dunbar*, following this Court's decision in *Crumady*, the Court held in a case where a barge owner has been held liable for negligence and unseaworthiness in respect of the death of the Master of the barge, that the barge owner could have indemnity from the owner and operator of the tug which was towing the barge at the time, if the negligence of the tug in the performance of its towage engagement brought the unseaworthiness of the barge and

---

* Admitted by the Fifth Circuit Court of Appeals to be in conflict with its own prior decision in *Hartford* v. *Gulf Refining Co.*, 230 F.2d 346 (1956), cert. den. 352 U.S. 832.

the negligence of the barge owner into operation as an instrumental cause of the death of the barge master. Following this decision of the United States Court of Appeals for the Second Circuit, the Court of Appeals for the Fourth Circuit in 1969 applied the maritime doctrine of indemnity as against a tower in *Tebbs* v. *Baker-Whitely Towing Company*, 407 F.2d 1055.

It is eminently clear that contribution and indemnity are mutually exclusive. If contribution applies to maritime non-collision personal injury damages, then obviously indemnity can not apply. If, as the Court below held, *Halcyon* is "inapplicable in cases where the joint tort-feasor against whom contribution is sought is not immune from tort liability by statute", then *Ryan* and its progeny are inapplicable except where the joint tort-feasor against whom indemnity is sought is immune from tort-liability by statute. It would be not only a most harsh but also a most illogical rule which would impose as a penalty for statutory immunity from tort-liability an obligation to completely indemnify the joint tort-feasor rather than contribute equally to the damages, but this is the way the Court below would interpret *Halcyon*. This fails to give any recognition whatever to the legal premises upon which contribution and indemnity rest, long established in the common law, and fully recognized by the decisions of this Court in *Halcyon* and *Ryan*, *Weyerhauser*, *Crumady* and *Italia*.

The decision below, if allowed to stand, creates a highly unjust and illogical anomoly in the Maritime Law. Assume a fact situation such as was present in *Crumady* where the stevedore by negligent performance of contract work brought into play as an instrument of harm an unseaworthy condition of a ship's winch which had been created by the vessel owner's own fault. In that case this Court allowed the vessel owner to recover full indemnity from the stevedore for resulting injuries sustained by a long-

shoreman. Suppose in the same situation injuries had been sustained not only by a longshoreman but also by a member of the ship's crew. Since the stevedore would not be insulated from tort liability for the injury to the crew member, under the decision below the ship owner would be entitled to recover full indemnity from the stevedore for damages paid for the longshoreman's injury but would only be entitled to recover contribution for damages paid for the crew member's injuries.

As was most recently pointed out by this Court in *Italia* in 1964, contribution and indemnity rest on entirely different legal premises and obviously the circumstance of statutory immunity from tort liability has no relevancy whatever.

The questions of the right to contribution or indemnity of one tort-feasor from another are so inextricably intertwined that to review the one question without regard to the other would only create greater confusion than already exists in what Judge Friendly referred to in *McLaughlin* as "this wonderland". The question of whether contribution or indemnity should be granted in a particular case is one of frequent occurrence in the Maritime Law requiring settlement by this Court. Since this Court has already granted certiorari in *Atlantic Coast Line RR Co.*, for a complete development of the applicable doctrine and to avoid increased confusion, certiorari should be granted in this case in order that the Court may have before it not only the question of the right to contribution but also the alternative question of the right to indemnity for maritime personal injuries in non-collision cases.

Conclusion

For the reasons above stated, a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit to review the judgment and decision of that Court

reversing the judgment entered herein in the United States District Court for the Southern District of New York dismissing the complaints in the above entitled consolidated actions and remanding the same to the District Court for an equal division of damages paid in settlement of the claims herein for the deaths of the two crew members of the barge Oil Transfer No. 32.

Respectfully submitted,

EDMUND F. LAMB,
Attorney for Petitioner,
350 Broadway,
New York, N. Y.

Dated: New York, New York, January , 1972.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 924-25—September Term, 1970.

(Argued July 12, 1971 Decided September 29, 1971.)

Docket Nos. 35819, 71-1017

In the Matter of the Complaint of SEABOARD SHIPPING CORPORATION, as owner of the Barge OIL TRANSFER 32,

Plaintiff-Appellee,

for exoneration from or limitation of liability.

MORAN INLAND WATERWAYS CORPORATION and MORAN TOWING AND TRANSPORTATION CO., INC.,

Claimants-Appellants.

In the Matter of the Complaint of MORAN INLAND WATERWAYS CORPORATION, as owner, and MORAN TOWING & TRANSPORTATION CO., INC., as chartered owner of Tug MARGOT MORAN,

Plaintiffs-Cross Appellees,

for exoneration from or limitation of liability.

SEABOARD SHIPPING CORPORATION,

Claimant-Cross Appellant.

Before:

FRIENDLY, *Chief Judge,*
LUMBARD and OAKES, *Circuit Judges.*

Appendix A

Cross appeals from dismissal of complaints of tug owner and barge owner for exoneration from or limitation of liability for death of two bargemen, after non-jury trial in the United States District Court for the Southern District of New York, Frederick vanPelt Bryan, *Judge*.

Reversed and remanded.

EUGENE UNDERWOOD (Burlingham Underwood Wright White & Lord), New York, New York (Robert B. Pohl, of counsel), *for Appellants and Cross-Appellees.*

EDMUND F. LAMB (Purdy, Lamb & Marchisio), New York, New York (Juvenal L. Marchisio, of counsel), *for Appellee and Cross-Appellant.*

OAKES, *Circuit Judge:*

A barge owner (Seaboard) and a tug owner (Moran) are before the court on cross appeals, each blaming the other for the loss of the lives of two bargemen, whose survivors have already been compensated by settlement. The parties here reserved their rights against each other under the settlement.[1] The court below held, in this exceptionally well-briefed case, that neither the negligence of the tug owner, Moran, the unseaworthiness of the barge, the negli-

---

[1] The terms of the settlement include payment of specific sums for the deaths of each of the two men, with releases from their personal representatives, but the survival of the respective claims of Moran and Seaboard against each other. In the event that either is held liable to the other, the settlement provides that the damages may include the sums advanced to settle the death claims. Neither party is required to prove its liability to the death claimants as a condition of obtaining indemnity from the other. It is to be noted that Seaboard, as barge owner, also claims $55,000 in damages to its barge.

gence of Seaboard, nor the negligence of the bargemen had been established by a preponderance of the evidence. Thus, the parties were left as the court had found them, and their respective proceedings for exoneration from or limitation of liability were dismissed.

The deaths of Arthur Naess and Charles Thompson occurred in November 1966 when they were lost from the barge Oil Transfer 32 (O.T. 32) during a wild storm on Lake Michigan while the barge was under tow by the tug Margot Moran (Margot).[2] Captain Naess's body was found, clad in foul weather gear, on November 20, 1966, on the east shore of the lake. His death was attributed to drowning. Mate Thompson's body was never recovered. When the tug's mate boarded the O.T. 32 at 0600 hours on November 4, after the storm had subsided, he found the aft deck of the barge awash about one foot at its lowest point just forward of the cabin, and the cabin filled with water to the sill, though its horizontal door was tightly closed and its vertical door ajar only about one inch. He also found both lifeboat and liferaft missing, the deck in a shambles with a broken port boom, cargo hoses over the side, cowl ventilators missing and pump and engine rooms full. The hull was later found sound by a diver. Moran and Seaboard, below and here, each attempted to reconstruct the events in a light most favorable to itself. We find them both at fault.

The O.T. 32 was a typical inland waterway steel barge, 1278 gross and net tons, 229.4 feet long by 42.9 feet wide and 14.5 feet deep. She had no propulsion power, but carried a crew of two certified tankermen. On October 30, 1966, she loaded a cargo of benzoil at Lemont, Illinois,

---

[2] Moran Inland Waterways Corporation was the owner and Moran Towing & Transportation Co., Inc., was the bareboat chartered owner of the Margot, but they have treated themselves and the court below has treated them as one. We do the same and refer to them collectively as Moran.

bound for Bay City, Michigan. She was pushed from Lemont to Chicago by the Margot, a tug of 141 gross and 96 net tons, 84.8 feet long with a 24-foot beam and 9.6-foot draft, powered by 1280 HP twin diesels. The O.T. 32's vocaline radio, which would have permitted communication with the Margot, had been out of order for several months, and its other means of communication, a sheet or a towel, floodlight, foghorn and flares, were not effective in the severe snowstorm that was brewing. The O.T. 32's lifeboat had been damaged in September 1966 (a Seaboard employee thought it, and the trial court found it, unseaworthy), and a canister containing an inflatable liferaft had been placed on board, but the canister was simply put in the useless lifeboat rather than on a proper cradle near the side of the barge. To compound the prescription for the disaster which ensued, the barge was loaded to a draft of 11 feet 1 inch fore and aft, her Intermediate Marks giving a free board of 3 feet 5 inches. This was fine for the day she was loaded, October 30, but the season for Intermediate Marks expired at 2400 hours the following day, October 31, and for the winter season following her maximum permissible drafts were 2¾ inches less than that permitted by the Intermediate Marks. Thus she was overloaded for the tow.

The Margot, like O.T. 32, was not fully equipped. Despite her direction finders and weather receiving radio equipment, the Margot's barometer was not calibrated for the Great Lakes; it was calibrated for the New York area and consequently the Margot's captain never bothered to check it.

After an uneventful trip from Lemont, the flotilla remained at Chicago from the afternoon of October 30 to 0830 hours November 1, because gale warnings were up and the October 31 forecast was for 34 to 40 knot winds.

Appendix A

With gale warnings up at the Coast Guard dock and still being broadcast on October 31 and November 1, the tug captain nevertheless left, telling the bargemen the trip might be "a little sloppy." About fifteen minutes after departure, when the lock between the Coast Guard dock and the harbor was cleared, the 1200-foot long hawser, with bridle and bitts, was placed, so that the barge was approximately 1300 feet or a quarter-mile astern of the tug. Because of the weather, instead of heading straight to Point Betsie (sometimes spelled Betsy in the record) Light across the lake, as would ordinarily have been done, after clearing the breakwater the flotilla went up the west shore of Lake Michigan. At 10:10 AM on November 1, the wind was northwest to north, 25-35 knots, the seas were heavy according to the Margot's log,[3] and the forecast was for winds increasing to 30-38 knots for the rest of November 1 and for November 2, with some snow flurries.[4]

The Margot with the O.T. 32 in tow continued up the west shore of the lake, slowing down at Wilmette from a full 650 RPM's to 575. The gods of weather gave the flotilla a little respite in the late afternoon: the gale warnings were reduced to small craft warnings and the northerly winds prediction was reduced to 24-32 knots. But at midnight the predicted snow flurries turned into a heavy snowstorm off Milwaukee, totally obstructing the Margot's radar as well as a visual fix on Wisconsin's largest city. The Margot slowed to 475 RPM's, but proceeded onward.

---

[3] The Moran captain testified it was a "heavy swell" but the log shows heavy seas for November 1 to November 4, changing slightly in direction from N to N-NE to NW.

[4] Gale force winds are measured on the Beaufort scale in four categories: 7, moderate gale (high wind), 28-33 knots; 8, fresh gale, 34-40 knots; 9, strong gale, 41-47 knots; 10, whole gale, 48-55 knots. Small craft warnings generally go up when the winds are at force 7. Gale warnings do not go up until the winds are at force 8.

During this time and for the remainder of the storm there was no radio contact with any other vessel on the lake. For another 9½ hours on Wednesday, November 2, the flotilla continued up the west side of the lake in heavy seas that were building up gradually from 5 feet and running from north to north-northeast, with intermittent heavy snow. Whether forecasts at 4:10 AM and 10:10 AM on November 2 carried small craft warnings and predicted snow flurries. Not insignificantly, the 10:10 AM November 2 forecast predicted higher winds (22-32 knots) than had the 4:10 AM forecast (20-27 knots).

Off Sheboygan at 9:30 AM on November 2, the venturesome Margot made a sharp course change, heading east-northeast across the lake toward Big Sable Bull Point on the east shore. The sea was now running at 7 feet, the flotilla was 11 miles off Sheboygan and about 50 miles from Big Sable.

That afternoon at 1:30 a Special Lakes Warning was broadcast changing small craft warnings back to gale warnings for that portion of the lake south of a line between Manitowoc on the western shore and Ludington on the eastern shore. The Margot was below the line. On toward Big Sable across the lake she pushed, however, reducing speed to 425 RPM's, at midnight, November 2, with the seas increasing; snow falling and no communication, visual or electronic, with the barge.

The 4:10 PM Wednesday, November 2, weather and the 10:10 PM forecasts had told in stark terms of the doom awaiting Naess and Thompson:

> 4.10 p.m. . . . Gale warnings in effect Manitowoc Ludington southward and change to gale warnings 7 p.m. EST Wednesday north of Manitowoc Ludington. Northerly winds 35 to 45 knots tonight becoming northwesterly 35 to 45 knots Thursday. Snow.

10.10 p.m. . . . Gale warnings in effect. Northerly winds 40 to 50 knots tonight becoming northwesterly Thursday morning and diminishing Thursday afternoon and night. Snow or snow flurries.

When asked to explain why he continued on course toward Big Sable despite the 1:30 PM special warning of November 2, when the flotilla could have turned back and made haven at Sheboygan (as the trial court found), the tug captain said, "We kept going in the same direction to get lee on the east shore." By 0600 hours on November 3, 10 miles off Big Sable Point, course was changed again and the flotilla ran north or northwest, into the wind, away from shore and head-on into one of the worst storms on the lake for years: "the worst one I have had," said a Moran deckhand with experience towing oil barges on the Great Lakes since 1949. The gyro on the tug "kicked out" and then the rack on the Margot's stern came loose in the rough weather. The wind was gusting 60-65 knots, steady 50, by 1500 hours on November 3, and the seas were running at least 15 feet. During all the night of November 2 and morning of November 3 there had been no running lights visible on the barge but a white light showed through a porthole in the cabin, seen during lulls in the storm. At 1830 hours on November 3 the storm cleared, and the Margot could see Point Betsie and the other fixes on the lake's east shore. It was 0645 hours on Friday morning the 4th, however, when the Margot's master noted that even the barge's cabin light wasn't lit and the barge was down, that is, its bow was high. The captain put full ahead to near shore until 0800 hours, when the hawser was pulled, and the tug's mate made his inspection trip, which revealed that Naess and Thompson were missing and the deck of the barge in the shambles partially described above. The barge's running light stanchions were bent over, part

of the lightboat cradle missing, the starboard pump room hatch dogs loose, three of the four stern ventilators gone, the after half of the engine room hatch open, cargo hoses tangled up and flopping over, engine room, pump room and cabin all flooded.[5]

In *Cleary* v. *United States Lines Co.*, 411 F.2d 1009 (2d Cir. 1969), this court recently reaffirmed its long-held view that the "clearly erroneous" test of Rule 52(a), Fed. R. Civ. P., does not apply to findings of negligence (or lack of it) although the conclusion of the district judge after a careful examination of the facts is entitled to great weight.[6] We must therefore examine the trial court's ultimate determination in the light of its findings and the evidence. *Esso Standard Oil Co.* v. *S.S. Gasbras Sul*, 387 F.2d 573 (2d Cir.), *cert. denied*, 391 U.S. 914 (1968).

Doing so, we deny exoneration to Seaboard, the barge owner. In three material respects the O.T. 32 was unseaworthy and, because the unseaworthiness was known or should have been known to Seaboard, in each respect Seaboard was also negligent. Its radio was out of order, with the antenna rusted away, and had been for the whole season. Since September 1966 its lifeboat had had a dent in the bottom one foot by two feet, and three to six inches deep, which Ode Odegaard, the barge's former captain—replaced for this voyage by Captain Naess—thought would make the lifeboat leak; and the inflatable liferaft installed

---

[5] A marine surveyor opined that wave action had damaged the bow light bracket, the port side running light box and stanchion, that some damage was done by loose gear adrift and damage below deck was done by loose gear and flooding. He found no damage to the head plate or side plating of the barge, and no damage holes in the barge or cabin.

[6] See *Mamiye Bros.* v. *Barber Steamship Lines, Inc.*, 360 F.2d 774 (2d Cir.), *cert. denied*, 385 U.S. 835 (1966). But see Wright, Federal Courts 432 n. 36 (2d ed. 1970).

in its place was improperly stowed.[7] Beyond this, Captain Odegaard had supervised the loading of the O.T. 32 to her Intermediate Marks, and it was evident that the flotilla could never have made Bay City by 2400 hours October 31, the time the season for Intermediate Marks expired. Cf. *Ionian Steamship Co.* v. *United Distillers of America, Inc.*, 236 F.2d 78, 81 (5th Cir. 1956); *The Vestris*, 60 F.2d 273 (S.D.N.Y. 1932).

Seaboard argues, however, that there was no evidence that any of the barge's defects or Seaboard's negligent acts probably caused the deaths, and that therefore there is a failure of proof. We need go no further here than to say, however, that given the statutory violations alone (the liferaft storage and the overloading), Seaboard is not entitled to exoneration. *The Pennsylvania*, 86 U.S. (18 Wall.) 125, 136 (1873), makes it clear that the burden is on a ship in violation of a safety statute—in this case the barge—to show "not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." Seaboard is wrong in its contention that admiralty applies this rule only in collision cases. *Kernan* v. *American Dredging Co.*, 355 U.S. 426 (1958) (fire on a tug caused by open-flame kerosene lamp carried

---

[7] Coast Guard Regulations provide:

§ 33.20-15 Stowage of lifeboats and liferafts—TB/ALL.

(a) All the lifeboats and liferafts shall be stowed in such a way that they can be launched in the shortest possible time. . . .

. . .

(d) Inflatable liferafts shall be stowed in such a manner that they will float free in the event of the vessel sinking. . . .

. . .

§ 33.25-20 Maintenance—TB/ALL.

(a) Every lifeboat, liferaft, or piece of buoyant apparatus together with its equipment shall be kept in every respect in good condition and ready for immediate use.

. . .

46 C.F.R. §§ 33.20-15, 33.25-20.

on scow in statutory violation); *The Denali*, 112 F.2d 952 (9th Cir. 1940) (stranding case). It is true that a panel of this court has recently held the rule of *The Pennsylvania* inapplicable in the case of a seaman's death from a heart attack after a violation of statutory working hour limitations. *Wilkins* v. *American Export Isbrandtsen Lines, Inc.*, Docket No. 35391 (2d Cir. June 21, 1971). But another panel has specifically reached the same result as we do here in a Load Line Act [46 U.S.C. § 85(b), (c)] violation case. *Petition of Long*, 439 F.2d 109 (2d Cir. 1971). See also *The New York Marine No. 10*, 109 F.2d 564, 566 (2d Cir. 1940) (collision case).

Moran likewise was not entitled to exoneration. The Margot's master knew that he did not have a properly calibrated barometer, which might have given him quicker warning of the erratic track of the storm than he received from the periodic Great Lakes radio bulletins. He knew he lacked radio communication with the barge so that if the O.T. 32 were in trouble the only way he would know was by a sheet or a towel or a floodlight signal which "the biggest part of the time you would not have been able to see" on this fatal November voyage. He had admittedly been informed of the damage to the barge's lifeboat. The barge bore Plimsoll marks on her side, and it may be inferred that the Margot's master knew how deeply the barge was loaded, for the Margot pushed the O.T. 32, it will be recalled, until both vessels cleared the Chicago breakwater. Knowing these defects in the tug and tow and in their intercommunication system, the Margot's master nevertheless set out after gale warnings had been issued and continued when he might readily have made safe haven at Sheboygan, even after the upward change in wind forecast at 10:10 AM on November 2, and the Special Lakes Warning at 1:30 PM for south of the Manitowoc-Ludington line. What he did after he

was practically across the lake, heading north into the storm, may have been in reaction to an emergency, if not *in extremis*, cf. *The Oregon*, 158 U.S. 186, 204 (1895), and we do not fault him on that. But, with the flotilla's conditions which he knew, to attempt to cross Lake Michigan in early November and to do so in the face of increasingly bad weather reports we think negligent. To be sure, as Moran points out, the Margot stayed close to the westerly shore until Sheboygan because her master was concerned about winds and sea from the northwest, as then predicted. But when he set out for the middle of the lake he had an increasing swell from the north-northeast, he had had no communication with any vessels on the lake, he had intermittent heavy snow and northeast to north winds predicted by both the 4:10 AM and the 10:10 AM broadcasts. Under any theory of the case—and the parties have advanced several—as to how the men were actually lost,[8] we think the Margot should have made for safe haven, rather than risk the northeaster, only to be exposed inevitably to the wind shift to northwest once the Margot made Big Sable and the eastern shore. This was not a voyage of exploration seeking a route around Cape Horn or through the Northwest Passage, where a venturesome admiral might risk life and vessel for a taste of glory; it was a tow across a big, tough lake to deliver a barge load of benzoil to Bay City, Michigan. If foreseeability of harm is the test of

---

[8] The trial court properly rejected as speculative Moran's theory that the two mattresses missing from the barge cabin, the loose gear on deck and the small opening in the vertical part of the cabin door indicate the missing men must have been lost because they went out to stuff the ventilator cowls with the mattresses, attempting to correct dangerous conditions "due to their own failure to secure the cargo hoses and the booms and hatches earlier." As Judge Bryan said, it is highly unlikely that the liferaft became inflated by itself or that in such a storm as this the bargemen would have left a secure cabin unless it were filling with water.

negligent conduct, setting out for Big Sable was negligent. *Petition of Kinsman Transit*, 338 F.2d 708, 723-24 (2d Cir. 1964), *cert. denied*, 380 U.S. 944 (1965).

No matter what actually happened on that barge in the storm, we think it must be inferred that the negligence of the Margot in crossing the lake easterly was a contributing cause of the seamen's deaths, and coincidentally to the barge's damage. We do not quarrel with the district judge's finding that "Plainly, the cause of the unfortunate loss of the two bargemen was the extremely violent winds and seas which were encountered during the final northwesterly leg of the voyage." The element of causation may, of course, be proven by circumstantial evidence. *Johnson* v. *Griffiths S.S. Co.*, 150 F.2d 224, 226 (9th Cir. 1945). See *The Black Diamond*, 273 F. 811, 812 (2d Cir. 1921); and 2 Harper and James, Torts § 20.2 (1956). But without the negligence of the tug in heading easterly with a mute and helpless tow into the approaching whole gale, this tragedy would not have occurred.

What legal consequences flow from the ultimate findings, then, that both Moran and Seaboard were at fault and that such fault legally caused the deaths of Naess and Thompson (and the damage to the barge)? Seaboard argues that it is entitled to indemnity from Moran, because even though the tow may have been unseaworthy, the tug brought that unseaworthy condition into play by the negligent manner in which it performed its towing operation, relying upon *Dunbar* v. *Henry Dubois' Sons Co.*, 275 F.2d 304 (2d Cir. 1960). Moran argues that it is entitled to indemnity from Seaboard because it is "Hornbook law" that the tow impliedly warrants its seaworthiness to the tug, relying upon, e.g., *South, Inc.* v. *Moran Towing and Transportation Co.*, 360 F.2d 1002 (2d Cir. 1966). Here, however, each was at fault, and the deaths and tow damage were the result of mutual wrong-

doing, each contributing to the end result, where the acts of one alone might not have been sufficient to cause any of the damage.[9] We believe that contribution lies, despite *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 284 (1952).[10] *Halcyon* held that there was no right of contribution between a shipowner and a shoreside contractor who were joint tort-feasors in a case involving injuries to an employee of the contractor while engaged in repair work on the ship. The Court said:

> Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained by each, as well as personal injury and property damage inflicted on innocent third parties. This maritime rule is of ancient origin and has been applied in many cases, but this Court has never expressly applied it to non-collision cases. 342 U.S. at 284 (footnotes omitted).

The Court expressly referred in its footnote 5 at 284 to *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446 (1947), where the Court had seemed to approve contribution in non-collision cases, but referred to the holding there as

---

[9] That Moran's negligence may have occurred later in time than Seaboard's is not important here. "[T]he maritime court has been less ready than the shore courts to find that a subsequent wrongful act by one party breaks the chain of causation connecting the accident with the prior negligence of the other party." Gilmore and Black, The Law of Admiralty 404 (1957) (footnote omitted). See also *Commercial Transport Corp.* v. *Martin Oil Service, Inc.*, 374 F.2d 813, 817 (7th Cir. 1967). Indeed, despite everything it is possible that the men's lives might have been saved if the liferaft had been stored according to regulation. Cf. *Town of Sharon* v. *Onahama Realty Corp.*, 97 Vt. 336, 125 A. 192 (1924); and *Wright* v. *Cooper*, 1 Tyler 425 (Vt. 1802), commented upon in 1 Harper and James, Torts § 10.1 (1956).

[10] See also *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U.S. 315 (1964).

"only incidental." In *Halcyon* the Court did not mention another non-collision case, *White Oak Transportation Co.* v. *Boston, Cape Cod & New York Canal Co.*, 258 U.S. 341 (1922). There a vessel sank in a canal due to the negligence of both shipowner and canal company. In an opinion by Mr. Justice Holmes, the Court found proper and equal division of all damages arising from the loss of the vessel and its cargo and injury to the canal. But *White Oak* did not involve, as, significantly, did *Halcyon*, an area of the law—harbor workers' personal injuries—in which Congress had adopted legislation (the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950).

In so holding we are by no means sailing uncharted waters. That busy admiralty court, the Fifth Circuit Court of Appeals, has only recently held *Halcyon* inapplicable where a barge capsized as a result of its own unseaworthiness and the jointly concurring negligence of tug and tow, causing the death of a deckhand from the tug who had boarded the barge to retrieve tug equipment. *Horton & Horton, Inc.* v. *T/SJ.E. Dyer*, 428 F.2d 1131 (5th Cir. 1970), *cert. denied*, 400 U.S. 993 (1971). In a carefully considered opinion by Judge Wisdom, the Fifth Circuit has followed its *Horton* case in *Watz* v. *Zapata Off-Shore Co.*, 431 F.2d 100, 120 (5th Cir. 1970). See also G. Staring, Contribution and Division of Damage in Admiralty and Maritime Cases, 45 Calif. L. Rev. 304 (1957), for an extensive discussion of the history of contribution in admiralty law.

Here, as in *Horton*, had Seaboard and Moran not settled with the personal representatives of Captain Naess and Mr. Thompson, both would have been responsible in damages, unlike the situation in *Halcyon* where the injured employee was restricted by the limited tort liability provisions of the Harbor Workers' Act and thus precluded from suing his employer once he had gone against the shipower. Cf. *Luigi*

Serra, Inc. v. *S.S. Francesco C*, 379 F.2d 540 (2d Cir. 1967). We believe *Halcyon* to be inapplicable in cases where the joint tort-feasor against whom contribution is sought is not immune from tort liability by statute.

We are further of the view that contribution in a tug-tow case involving fault of both produces the most equitable result. See, e.g., Gregory, Contribution Among Joint Tort-feasors: A Defense, 54 Harv. L. Rev. 1170 (1941). There is also a certain "utility and economy" in spreading the loss. 1 Harper and James, Torts § 10.2 (1956).

Insofar as *White Oak, supra,* has never been overruled, it controls here on the question of contribution and the extent of it.

Reversed and remanded for an equal division of the damages paid in death settlements and the damage to the O.T. 32.

APPENDIX B

OPINION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

---

67 Civil 967

In the Matter of

The Complaint of MORAN INLAND WATERWAYS CORPORATION, as owner, and MORAN TOWING & TRANSPORTATION CO., INC., as chartered owner of tug MARGOT MORAN, for exoneration from or limitation of liability.

---

67 Civil 2511

In the Matter of

The Complaint of SEABOARD SHIPPING CORPORATION, as owner of the Barge OIL TRANSFER 32, for exoneration from or limitation of liability.

BRYAN, *District Judge:*

[1.] In early November, 1966 Arthur Naess and Charles Thompson, two bargemen, were lost from the barge Oil Transfer 32 (O.T. 32) during an extremely severe storm while the barge was under tow by the tug Margot Moran (Margot) on Lake Michigan. Moran Inland Waterways Corporation was the owner and Moran Towing and Transportation Co., Inc. the bareboat chartered owner of the tug Margot. (These corporations will be referred to as Moran.)

Appendix B

Seaboard Shipping Corporation (Seaboard) was the owner and operator of the O.T. 32.[1] Claims were made against Moran and against Seaboard for the two deaths and Seaboard made claim against Moran for damage sustained by the O.T. 32. Seaboard and Moran then each filed a separate proceeding in admiralty for exoneration from or limition of liability.

[2.] Claims to recover for the deaths were made in both limitation proceedings on behalf of the wives of Naess and Thompson. Subsequently, Moran and Seaboard entered into a joint settlement with the death claimants pursuant to which each advanced a portion of the $225,000 paid in settlement. The agreement provided:

> "6. In the event that Seaboard is held liable to Moran, Moran shall be entited to include in its damages the sum which it will advance to settle the death claims, and in the event that Moran is held liable to Seaboard, Seaboard shall be entitled to include in its damages the sum which it will advance to settle the death claims.
>
> "7. Neither Moran nor Seaboard shall be required to prove its liability to the death claimant or any justification, legal or otherwise, for the settlement with the death claimants as a condition precedent to obtaining indemnity from the other."

[3.] Under these provisions Moran seeks to recover from Seaboard by way of indemnity the amount it contributed to

---

[1] Both Moran Towing and Seaboard are wholly-owned subsidiaries of Moran Inland Waterways Corporation. Apparently, however, all three are operated independently of one another in all respects.

settle the death claims. In the alternative, it seeks contribution from Seaboard.

[4.] Seaboard, on the other hand, seeks to recover from Moran the amount it contributed to the settlement of the death claims. It also claims damages in the sum of $55,000 allegedly sustained by the O.T. 32. In any event, Seaboard seeks to limit its liability in order to fend off any recovery against it by Moran.

[5.] The issues thus presented were tried before me without a jury.

[6.] The O.T. 32 is a steel tank barge, 1278 gross and net tons, 229.4′ long by 42.9′ wide by 14.5′ deep. She had no propulsion power but carried a crew of two certified tankermen. On October 30, 1966 she loaded a cargo of benzoil at Lemont, Illinois for Bay City, Michigan. On the morning of October 31, 1966, the O.T. 32 was pushed from Lemont to Chicago by the tug Margot on the first leg of the voyage. The Margot is a steel tug 141 gross tons, 96 net tons, 84.8′ long by 24′ beam by 9.6′ depth with 1280 h.p. diesel engines. She carried a crew of 7 including Chester MacDonald, her Captain. The officers of the tug and the crews of both tow and tug were thoroughly experienced and well qualified. The Margot was equipped with various types of direction finders and weather receiving radio equipment. She did not, however, have a barometer calibrated for the Great Lakes. Seaboard claims that her failure to have a working barometer rendered her unseaworthy.

[7.] The O.T. 32 was structurally seaworthy and certified by the Coast Guard. However, its vocaline radio with

which to communicate with the tug was and had been out of order for several months. If the bargemen wished to communicate with the tug they had agreed to display a sheet or to use the floodlight at night. The barge was also equipped with a foghorn and flares. None of these devices, however, was an effective means of communication between the two vessels in a severe snow storm.

[8.] In addition, the lifeboat on the O.T. 32 had sustained damage in September, 1966 and was unseaworthy. To remedy this an inflatable liferaft had been put aboard the barge at Lemont. The liferaft was an adequate and reasonable substitute for the damaged lifeboat. However, the bargemen were not instructed that proper installation called for the liferaft cannister to be placed on a cradle on the deck near the side of the barge so that it could easily be pushed over the side and inflated. Instead, the liferaft cannister was simply placed within the damaged lifeboat.

[9.] At Lemont the O.T. 32 was loaded to drafts of 11′ 1″ forward and aft, her Intermediate Marks giving a freeboard of 3′ 5″. The season for Intermediate Marks expired at 2400 October 31 and at 0001 November 1 the winter season commenced during which her maximum permissible drafts were 2¾″ less than the Intermediate Marks.

[10.] The trip from Lemont to Chicago was uneventful and the flotilla arrived there on the afternoon of October 31. Gale warnings for Lake Michigan remained up throughout that day. This prompted Captain MacDonald to remain at Chicago rather than to set out immediately. The next

morning, although gale warnings were still in effect, the actual weather conditions at Chicago, as well as at Milwaukee, 75 miles up the west shore of the Lake, were quite moderate. With winds coming from the northwest, MacDonald determined that there would be no risk as long as he remained in the lee of the west shore. Before leaving Chicago, at 0830 on November 1, he informed the bargemen aboard the O.T. 32 that the weather would be a little sloppy and while he did not tell them that gale warnings were in effect, the gale flag was up at the Coast Guard dock in plain view. In view of the fact that Captain MacDonald could reasonably have expected the winds to continue from the northwest, it was not unreasonable for him to set out in the face of gale warnings and he was not negligent in so doing.

[11.] At 0830 on November 1, the Margot pushed the O.T. 32 onto Lake Michigan and there took her in tow on a 1200 foot hawser. The crew of the O.T. 32 consisted of Barge Captain Naess and Mate Thompson.

[12.] At 1800 on November 1, while the flotilla was traveling north along the west shore of the Lake, gale warnings were lowered and small craft warnings were raised. The forecast continued to call for northwest winds. Intermittent heavy snow fell during the afternoon and evening of November 1. Seas increased and the speed of the tug was reduced.

[13.] At 0230 November 2, the Margot received a report from Point Betsie on the east shore of the Lake of winds NNE. At 0930 on November 2; when the flotilla was 11

miles off Sheboygan on the west shore, the winds had actually shifted to the northeast with velocities of 20-25 MPH. Small craft warnings were still in effect. In order to seek the lee on the east shore and so that the flotilla would head into the weather and seas, MacDonald changed course and headed northeasterly across the Lake toward Big Sable Point, 60 miles away on the east shore. Before heading across the Lake at 0930 on November 2, the tug could safely have put in at Sheboygan if MacDonald had thought it necessary. It was not, however, unreasonable under the circumstances to change course and head across the Lake and the failure to do so was not negligent. At 1200 November 2 the forecast was for northeasterly winds with snow, and small craft warnings were up.

[14.] At 1330 on November 2, four hours after the flotilla had shifted course at Sheboygan and headed across the Lake toward Big Sable Point, a special weather bulletin was broadcast for the portion of the Lake in which the flotilla was then located, changing small craft warnings to gale warnings at 1500 hours. Winds were still from the northeast and no shift to the northwest was forecast or anticipated at that time. The O.T. 32 had consistently appeared to be riding well and there was no reason to be apprehensive about her safety. Thus, MacDonald continued across the Lake to seek the lee on the east shore. While it was possible to turn back at 1330, MacDonald's decision to proceed across the Lake was not unreasonable and his failure to turn back was not negligent.

[15.] At 1800 on November 2 the forecast was for winds N 41-47 knots for 12 hours, shifting to NW in the follow-

ing 12 hours. The cabin lights of the barge were visible. There is no evidence that it was possible at this point to return the flotilla to the west shore and Seaboard makes no such claim.

[16.] At 0000 November 3, the forecast was for winds N 41-47 knots for 9 hours, shifting to NW during the succeeding 9 hours, then NW 28-33 knots for the following 6 hours, with snow or rain and snow. The flotilla continued to experience northeasterly winds and seas. It proceeded without apparent difficulty toward Big Sable Point. At daybreak the cabin lights of the barge were burning.

[17.] At 0600 on November 3, when the tow was 10 miles from Big Sable Point on the east shore of the Lake, the winds shifted to the northwest. Because of the nature of the available harbors on Lake Michigan, it was unlikely that, under the existing weather conditions, the tug could have brought the barge on a 1200-foot hawser safely into a harbor on the east shore. Moreover, it would have been unsafe to shorten the hawser under the circumstances. Thus, the only reasonable alternative available to Captain MacDonald was to change course and head into the winds and seas toward the west shore of the Lake. This is what he did at 0600 on November 3.

[18.] At about 0700 on November 3, the O.T. 32 was observed, through lulls in the snow, to be riding and following well. No distress signals from her crew were seen. However, the lifeboat of the barge was observed to be athwartship instead of in its regular fore and aft position. The Margot was proceeding at reduced speed and was in no difficulty.

Appendix B

[19.] At mid-afternoon of November 3, the storm increased to peak intensity with winds of about 50 knots, gusting to 65 knots, and seas of about 15 feet. At this point, the Margot had no alternative but to proceed as best she could, heading northwesterly into the weather and seas so as to minimize the effect of the winds and seas on the flotilla.

[20.] At 1530 on November 3, the O.T. 32's liferaft was found, fully inflated, floating ashore at Big Sable Point. No one was aboard the liferaft. Of course, this was not known to the Margot and her crew at the time

[21.] At 1800, on November 3, gale winds for some 15 hours were still indicated. At 1830 hours, however, the snow stopped. The flotilla was then 20 miles WSW of Point Betsie Light on the west shore of the Lake. No lights were visible on the barge. However, those on the tug assumed that the lights in the cabin were out because the bargemen were asleep. The flotilla continued into slowly diminishing northwesterly seas at an increased speed so as to arrive off the west shore of the Lake at daybreak.

[22.] At 0600 on November 4, when the flotilla was some 14 miles from Cana Island, gale warnings were lowered and small craft warnings were raised. When it became light it was observed that the bow of the OT 32 was riding high. It was still too rough to shorten the hawser or to get alongside the barge. However, at 0800 the hawser was hauled and the mate of the tug boarded the barge.

[23.] He found that the aft deck was awash about 1′ at its lowest point just forward of the cabin. Though the horizontal door of the cabin was tightly closed, the vertical door was ajar about 1″. Both cabin doors opened aft. The cabin was filled with water to the sill. The lifeboat and liferaft were missing. The deck was in a shambles with a broken port boom, cargo hoses hanging over the side, cowl ventilators missing and pump and engine rooms flooded. The two bargemen were missing.

[24.] From 0600 November 3 to 0800 November 4, weather and sea conditions were such that the tug could not have put the flotilla into an east shore port, nor could it have attempted to go back alongside the barge or draw off to one side for a clear look at her, because of the danger of both tug and barge broaching.

[25.] When the mate reported the results of his inspection, the tug notified the Coast Guard and proceeded to Sturgeon Bay. There the O.T. 32's pump room, engine room and cabin were pumped out. There was no damage to her hull or her cargo which was later outturned intact after she had been towed to Bay City, Michigan on November 7.

[26.] The body of Captain Naess was found on the beach at Glenhaven, Michigan, on the east shore of the Lake on November 20, 1966. He had died from drowning.

[27.] The body of Mate Thompson was never found.

Appendix B

The Liability of Moran

[28.] In South, Inc. v. Moran Towing and Transportation Co.; 360 F.2d 1002 (2d Cir. 1966), the Court of Appeals of this Circuit recently restated the principles upon which the liability of a tug to its tow is based:

> The fact that the tow appeared to be in good order when delivered to the Tug and yet suffered damage before reaching its destination does not in itself raise a presumption of negligence; and this is so even where the tow was . . . unmanned. Neither the Tug nor its owner is a bailee or an insurer. Stevens v. The White City, 285 U.S. 195, 200-201, 52 S.Ct. 347, 76 L.Ed. 699 (1932). In that case the Supreme Court said, at page 201, 52 S.Ct. at page 349:
>
> "It has long been settled that suit by the owner of a tow against her tug to recover for an injury to the tow caused by negligence on the part of the tug is ex delicto and not ex contractu." . . .
>
> The White City case also holds that the burden of proof in showing negligence on the part of the tug rests upon the libellant tow throughout trial; . . . 360 F.2d at 1005.[2]

---

[2] Relying on James McWilliams Blue Line, Inc. v. Esso Standard Oil Company, 245 F.2d 84 (2d Cir. 1957) and Dunbar v. Henry Dubois' Sons Co. Inc., 275 F.2d 304 (2d Cir. 1960) Seaboard contends that a warranty of workmanlike service runs from a tug to its tow. While those cases seem to establish such a doctrine, the warranty is certainly not tantamount to absolute liability and plainly does not affect the principle that a tug is not liable to its tow in the absence of negligence.

[29.] Moreover, a tug captain is guilty of negligence only upon a showing of his failure "to exercise such reasonable care and maritime skill as prudent navigators employ for the performance of similar services." Stevens v. The White City, supra, at 202; M. P. Howlett, Inc. v. Tug Michael Moran, 425 F.2d 619 (2d Cir. 1970). The Court of Appeals has recently cautioned that in determining this question the trier of the facts may not employ the luxury of hindsight. "In faulting the master of a tug for choosing one course of action over others that may have been available in situations requiring judgment under conditions of abnormal stress, we must be careful to 'judge the conduct of the master of a vessel in the light of the circumstances which he faced at that time . . . and not as they may have appeared to one looking back at them several hours or days later.' Esso Standard Oil, S.A. v. S.S. Cosbras Sul, 387 F.2d 573, 582 (2d Cir. 1968)." M. P. Howlett, Inc. v. Tug Michael Moran, supra.

[30.] Applying these principles to the case at bar, it is apparent that Captain MacDonald's conduct under all the circumstances was not unreasonable and that he was not negligent. Decisions which were reasonable under the circumstances had brought the flotilla to a point 10 miles off the east shore of Lake Michigan at 0600 on November 3. These decisions were based on the actual weather conditions which had been observed and weather conditions predicted by reliable weather stations which the tug received at regular intervals. Furthermore, there was no indication that the barge or her crew were experiencing any difficulty. Visual observations during breaks in the

snow indicated that the tow was riding well. During the night of November 2-November 3 the cabin lights were burning and the only abnormal occurrence was the absence of running lights; these, however, had been short circuited by spray on many previous occasions and thus did not cause concern.

[31.] When the wind shifted to the northwest, at 0600 on November 3, considerably before this was to be anticipated, MacDonald determined that the risks involved in attempting to bring the flotilla into a harbor on the east shore were greater than those involved in heading back across the lake toward the west shore.

[32.] This decision was made in the exercise of MacDonald's best judgment as an experienced tug captain and in the light of the conditions and circumstances as they existed at the time. Plainly, the cause of the unfortunate loss of the two bargemen was the extremely violent winds and seas which were encountered during the final northwesterly leg of the voyage. But it has not been shown by the evidence that MacDonald's decision to cross the lake to the Northwest, in the light of the circumstances which he faced at the time, so departed from standards of prudent seamanship or was so unreasonable as to constitute negligence.

[33.] Seaboard's contention that the failure of the Margot to have a working barometer, calibrated to the Great Lakes, was negligence which caused the loss is without support in the record. There is nothing to show that if the barometer had been working properly it would have enabled MacDonald to forecast the critical and unexpected

shifts in the wind any better than he was able to do with the periodic and regular reports he was receiving from shore weather stations employing highly sophisticated forecasting equipment, or would have been a factor in the decisions which he made. The fact that these forecasters were unable to predict accurately the conditions which, in fact, developed indicates that it was the unusual course of the storm and not the failure to have a working barometer aboard the tug which caused the flotilla to be on Lake Michigan when the storm peaked.

[34.] Nor has Seaboard adduced any evidence to support its contention that the failure of the Margot to notify the Coast Guard of the flotilla's situation when it was off the east shore of the Lake constituted negligence which caused the loss. There is nothing to show that the Coast Guard had any means by which to aid the flotilla in gaining entrance to a safe harbor on the east shore. And it has not been shown the failure to alert the Coast Guard as the storm increased in intensity contributed to the tragedy which took place.

[35.] I find that it has not been established by a preponderance of the evidence that Moran was guilty of any negligence which caused the loss of Naess and Thompson. Accordingly, Seaboard may not recover from Moran by way of indemnity or contribution the amount or any part of the amount Seaboard paid out in settlement of the death claims or the damages sustained by the O.T. 32 as a result of the storm.

Appendix B

The Liability of Seaboard

[36.] For its own part, Moran seeks to recover from Seaboard the amount it contributed to settle the death claims. It contends that pursuant to the settlement agreement it may recover its contribution because the loss of Naess and Thompson was caused in whole or in part by Seaboard's negligence or by the unseaworthiness of the O.T. 32 on its departure from Chicago and during the voyage.

> It is . . . settled that the owner of a tow is responsible for its seaworthiness and warrants that she is . . . sufficiently staunch and strong to withstand the ordinary perils to be encountered on the voyage. The Edmund L. Levy, 128 F. 683, at 684 (2d Cir. 1904); Frederick Snare Corp. v. Moran Towing & Transportation Co., . . . [195 F.Supp. 639, 644 (S.D.N.Y. 1961)]

South, Inc. v. Moran Towing & Transportation Co., supra at 10005. And if damage results to the tug from a failure of the tow to render itself seaworthy, the tug may recover therefor. South, Inc. v. Moran Towing & Transportation Co., supra.

[37.] Moran claims that the O.T. 32 was unseaworthy in that (1) the barge crew failed to lash the cargo hoses and booms; (2) they failed to secure the hatches and turn the ventilators facing aft; (3) Seaboard failed to supply the barge with an operable radio which could communicate with the tug; (4) Seaboard failed to supply a seaworthy lifeboat and failed to instruct the bargemen on the proper

installation of a liferaft; and (5) the barge was loaded below her permissible draft for the winter season which commenced during the voyage. Moran contends that it was the unseaworthiness of the barge, the negligence of Seaboard in failing to see that the barge was properly equipped, and the negligent failure of the barge crew to correct the unseaworthy conditions aboard her which caused the deaths.

[38.] The key aspects of this case concern what caused Naess and Thompson to leave the cabin of the O.T. 32 and go on deck and what happened to them when they did. Such questions as whether they then attempted to leave the O.T. 32 intentionally, whether they succeeded in so doing and were lost later, or whether they were swept or knocked overboard, are vital. No one observed what occurred and the record is devoid of direct evidence on these questions.

[39.] Relying primarily on the conditions observed aboard the barge when the loss of the bargemen was discovered, and the overall surrounding circumstances, the parties have each attempted to reconstruct the chain of events which brought about the two deaths according to the theories which best support their respective claims with respect to liability.

[40.] The evidence indicates, and the parties apparently agree, that the men were lost sometime during the morning or early afternoon of November 3. It appears that when the loss was discovered the aft portion of the deck of the barge was awash about one foot at its lowest point just for-

ward of the cabin. Both sides of the engine room were filled with water, although the watertight door which separates the port and starboard sides was closed. The after cover of the starboard engine room was open 12 to 18 inches, held in that position by a line caught in its hinges. Both covers of the port engine room hatch were closed and dogged. The cowls on both port and starboard engine room ventilators were missing.

[41.] The pump room was also filled with water. The after cover of the starboard pump room hatch was closed but not dogged. Apparently, the other three covers on the pump room hatches were closed and dogged. The cowl ventilator on the port side of the pump room was in place, facing forward. The cowl ventilator on the starboard side of the pump room was missing.

[42.] The cabin of the barge, the doors of which faced aft, was also flooded. The manhole cover on the floor of the cabin leading to the pump room below was open. Most of the equipment in the cabin was destroyed but the two mattresses were missing. The 2½ foot galley smokestack was missing. The 5 foot galley smokestack was in its storage bracket. The vertical portion of the cabin door was ajar about 1 foot.

[43.] There was no trace of lashings in any of the lashing eyelets on the cradles for the four cargo hoses or in the lashing eyelets of the boom cradles. The two starboard cargo hoses and the starboard boom were hanging over the starboard side. The two port cargo hoses were also out of place and the port boom was broken.

[44.] The lifeboat was missing and was never recovered. The liferaft was found fully inflated but empty, floating ashore at Big Sable Point, at 1530 on November 3.

[45.] When the body of Arthur Naess was found on the east shore of Lake Michigan on November 20, 1966, he was dressed in full heavy-weather gear, including rubber parka with hood, rubber trousers and lifejacket. His glasses were on. The only markings on the body were abrasions and contusions on the skin of both legs. As has been indicated, the body of James Thompson was never found.

[46.] Based on these facts, Moran advances the following theory as to how the two bargemen were lost:

[47.] Upon leaving Chicago and thereafter, the bargemen failed to lash the hoses and booms, to secure the hatches, and to turn the ventilator cowls aft. When the storm intensified on November 3, water entered the engine and pump rooms through the unsecured hatches and the ventilator cowls which faced forward. The hoses and booms which had not been lashed, thrashed around on the deck. At some point the bargemen dressed in their heavy-weather gear and left the cabin to correct the situation on deck. They took their mattresses with them to cover the pump room ventilator cowls which under the weather conditions could not be turned aft. They left the vertical cabin door undogged so that they could re-enter the cabin more easily. Once on deck they were struck by or tripped over the unsecured hoses and were washed or knocked overboard. Later, the cabin filled with water which entered through the open vertical door. The engine and pump rooms be-

came flooded, the aft portion of the barge lost buoyancy and the seas came over the stern and carried away the ventilator cowls.

[48.] According to the Moran theory, the liferaft was released from the lifeboat when the latter was damaged by the unsecured cargo hose. The liferaft then became inflated by itself when its trip line caught on a broken portion of the lifeboat. When inflated it was blown overboard and drifted to Big Sable Point.

[49.] As Moran points out, the element of causation may be proved by circumstantial evidence. Johnson v. Griffiths S.S. Co., 150 F.2d 224 (9th Cir. 1945). Moreover, in the absence of direct evidence, a showing that the accident more probably occurred in one way than another, if supported by a fair preponderance of the credible evidence and the reasonable inferences to be drawn therefrom, may be sufficient to *support* a finding that the accident occurred in the more probable way. See The Black Diamond, 273 F. 811, 812 (2d Cir. 1921); The Wineco, The J.G. Reichert, The Mary E. Reilly, 39 F.2d 970 (E.D.N.Y. 1921). It is clear, however, that the existence of mere probabilities in no way *compels* such a finding where other reasonable inferences may be drawn. Cr. Schulz v. Pennsylvania R. Co., 350 U.S. 523 (1956); Reck v. Pacific-Atlantic S.S. Co., 180 F.2d 866 (2d Cir. 1950); Casey v. American Export Lines, 173 F.2d 324 (2d Cir. 1949).

[50.] In the case at bar Moran has failed to establish even the probability that the deaths occurred in the manner suggested by its theory, much less that there are no other

inferences to be drawn. Thus, while it is not impossible for the bargemen to have been lost in the way Moran claims, it is plain that Moran's theory is based almost entirely on pure speculation.

[51.] Such evidence as there is before me (and it is little enough) tends to indicate that the deaths did not occur in the manner suggested by the Moran theory and were not brought about by the negligence of Seaboard or unseaworthy conditions aboard the O.T. 32.

[52.] It seems highly unlikely that the liferaft became inflated by itself and was not inflated by the bargemen. It may well have been that when Naess and Thompson donned their full heavy-weather gear and left the cabin for the last time, their purpose was to inflate the liferaft in preparation for leaving the barge. In a storm as severe as this one, it is unlikely that the bargemen would have left a secure cabin unless the cabin was filling with water and they had no alternative but to do so. In fact, they may have believed that the barge was in imminent danger of sinking.

[53.] There is no doubt that the storm was extraordinarily violent. One witness testified it was the worst he had seen in twenty years on the Lakes. The winds and seas pounded the barge with terrific force and the bow light brackets, the running light box and its stanchion had been twisted and distorted by the pounding. The ventilator cowls may well have been blown or washed away by the action of wind and wave, thus allowing the engine and pump rooms to become flooded and causing the barge to settle at the stern. Apparently the small galley smokestack was blown

away and it may have been through that aperture that water poured into the cabin. Indeed, there is testimony that some water had come through the smokestack on previous occasions. There is nothing in the record, however, to indicate that the large galley smokestack, which Moran claims should have been used, would have fared any better. The hatch from the cabin to the pump room may have been opened by the bargemen in order to let water drain from the cabin. If so, because of the flooding of the pump room, the effort to drain the cabin would have been unsuccessful.

[54.] Such probabilities as there are suggest that substantial flooding in the cabin forced the men to leave it and, in the absence of another safe place on the barge, to attempt to leave the barge. In such circumstances, it is probable that they inflated the liferaft, put it over the side and attempted to board it. It may well have been that they were unsuccessful in that attempt and that it was there that they were lost.

[55.] All this, of course, is speculation also. Whatever theory may be advanced is full of difficulties. It will serve no useful purpose to pile speculation upon speculation. It is enough to say Moran has failed to sustain its theory by a fair preponderance of the credible evidence and thus has failed to establish that the failure to secure the cargo hoses, booms and hatches and to position the ventilator cowls properly was a contributing factor in bringing about the deaths of Naess and Thompson.

[56.] The same can be said of the incorrect positioning of the liferaft in the lifeboat and the fact that the lifeboat

was unseaworthy. The liferaft was entirely seaworthy and quite as adequate as the lifeboat for use in an emergency. The liferaft was inflated and over the side and this may well have been done by the two bargemen. There has been no showing that the positioning of the liferaft aboard the barge or the unseaworthiness of the lifeboat had anything to do with the deaths.

[57.] Moran does not seriously contend that the failure of the barge to have an operable radio with which to communicate with the tug had any causal relationship to the deaths. Indeed, the theory which Moran advances as to how the deaths occurred does not remotely suggest that the absence of a radio had anything to do with what happened. Moran does not make any suggestion that anything could have been done to avoid what occurred had the barge been able to communicate with the tug by radio. Thus, Moran has failed to establish that the absence of a radio was a cause of or contributed to the tragedy.

[58.] Finally, even assuming that the loading of the barge at a date when intermediate marks were still applicable, 2¾" below her permissible marks for the winter season which commenced during the voyage, was improper, Moran has made no showing that this was a cause of or contributed to what occurred.

[59.] I find that Moran has failed to prove by a fair preponderance of the credible evidence that the deaths of Naess and Thompson were caused by the unseaworthiness of the barge or the negligence of Seaboard or the bargemen themselves. Therefore, Moran may not recover from Sea-

board by way of indemnity or contribution the money Moran paid out in settlement of the death claims. Moreover, since Seaboard is not required to respond in damages beyond the amount it has already contributed to settle the death claims, it is unnecessary to decide whether Seaboard is entitled to limit its liability.

[60.] Judgment will therefore be entered dismissing both the proceeding of Seaboard and the proceeding of Moran. The foregoing constitute my findings of fact and conclusions of law in this case.

IT IS SO ORDERED.

FREDERICK vP. BRYAN
United States District Judge

Dated: New York, New York
October 30, 1970